Supreme Court, U.S.
FILED
96 789 NOV 19 1996.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

WSB ELECTRIC, INC. and
J. R. ROBERTS CORPORATION,

Petitioners,

v.

JAMES CURRY, IN HIS OFFICIAL CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA; RONALD RINALDI, DIRECTOR OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California prevailing wage law, which denies credit against the total wage obligation for payments of fringe benefits contributions over a "prevailing" state mandated amount, thereby effectively placing a cap on fringe benefits that public works contractors may provide on behalf of employees in lieu of cash compensation, "relates to" or has a "connection" with employee welfare benefit plans and is therefore preempted by operation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, where credit is allowed for fringe benefit contributions below the state mandated amount and the prevailing wage amount is based upon the "costs" of prevailing fringe benefit programs plus wages.

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PETITION FOR WRIT OF CERTIORARI

Petitioners WSB Electric, Inc. and J. R. Roberts Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above action on July 5, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 88 F.3d 788 (9th Cir. 1996) and is reprinted in the appendix to the certiorari petition ("App.") at App. 1a. The Order of the Court of Appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at App. 23a. The unpublished opinion of the United States District Court for the Northern District of California granting Respondents' Motion for Summary Judgment is reprinted at App. 25a.

JURISDICTION

The Ninth Circuit issued its decision and judgment herein on July 5, 1996. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 19, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are reproduced in the appendix at App. 47a. The relevant federal statutory provisions are § 514(a), 29 U.S.C. § 1144(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. The relevant California statutory provisions are California Labor Code § 1771, 1777.1 and 1775. The relevant California regulations interpreting Labor Code § 1771 are Title 8, California Code of Regulations ("C.C.R.") §§ 16000, 16200, and 16203.

STATEMENT OF THE CASE

Petitioners seek review of the California prevailing wage laws which improperly integrate fringe benefit contributions from existing "prevailing" benefit plans into the wage obligation of public works contractors. This action is similar to another case before the Court, ***State of California, etc. v. Dillingham Construction***, No. 95-789 (argued Nov. 5, 1996), in that it represents another attempt by the State to coerce public works contractors into funding or creating benefit plans whose level of contributions are defined by the State. In this case, the state is attempting to regulate the funding aspects of a fringe benefit program covered by the Employee Retirement Income Security Act of 1974, ERISA.

Currently, construction contractors who are awarded California public works contracts which are more than $1,000.00 must pay their employees "the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed[.]"

Labor Code § 1771. The prevailing wage is defined by regulation as the "basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area." 8 C.C.R. § 16000.

In California, the prevailing wage is generally a "modal" rate, that single rate being paid to the greatest number of workers in the area.[1] General per diem wages set forth include the prevailing basic straight-time hourly rate of pay, the prevailing rate for holiday and overtime work, apprenticeship training contributions, and the prevailing rate of employer payments for fringe benefits, which includes contributions to plans providing health and welfare, and pension benefits, which are by definition employee benefit plans regulated under ERISA.[2]

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[1] The "modal" rate, which is not an average rate, allows union wages to become the State's prevailing wage, even if only a fraction of the workers are union or are paid union scale. For example, if one considers ten workers, two being paid $9.00 per hour, and the rest paid different and separate amounts between $6.00 and $8.00, the "prevailing" wage will be $9.00, since that amount is being paid to a greater number of workers (two) than any other amount, regardless of the fact that the average wage of the ten workers will be lower. Unions are exempt from antitrust and anti-collusion laws which prevent non-union employers from ever enjoying the modal rate.

[2] Under 8 C.C.R. § 16000, "General Prevailing Rate of Per Diem Wages" is defined to include:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

All prevailing wage determination for public projects must separately state, *inter alia*, the basic straight time hourly rate and the prevailing contribution level, i.e., the prevailing employer payments for benefits. 8 C.C.R. § 16203 App. at 84a. Under the current system, a public works contractor is given a choice whereby he or she can either: a) pay the stated total hourly rate in cash; b) pay

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(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

the basic straight time wage in cash and the remaining prevailing contribution level for legitimate fringe benefits on behalf of the employee; or c) pay the basic straight time wage in cash, a lesser amount than the prevailing contribution level to fringe benefits, and the remaining difference of the contribution level in cash. According to 8 C.C.R. § 16200(a)(3)(I), entitled (emphasis added): "Credit Available For Actual Payment of Fringe Benefit Costs *up to the Prevailing Amount:*"

> The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000 (1) - (3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

Employer Payments are expressly defined under 8 C.C.R. § 16000 to include:

> (1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents, or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the worker affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

A contractor must therefore consider two separate items when paying the prevailing wage: the basic hourly rate and the prevailing contribution level. While the regulations allow a contractor to take credits up to the prevailing contribution level against the total hourly prevailing wage rate, the contractor cannot take any credit whatsoever against the basic straight time hourly wage for contributions that exceed the prevailing contribution level. Any amounts which are contributed for fringe benefits that exceed the prevailing contribution level are simply ignored in terms of calculating the total hourly prevailing wage paid. Essentially, a contractor providing lower than the prevailing contribution level is required to pay additional cash wages or benefits in order to comply with this two-tier method while a contractor paying above the prevailing contribution level is not able to credit more than the prevailing contribution level in determining the wages to be paid to his or her employees.

If the basic hourly wage is not paid in cash, and the prevailing contribution level is not paid in a combination of either cash or fringe benefits, a contractor will be subject to statutory penalties. Besides the assessment of the purported back wages owed, the contractor will be subject to penalties in the amount of $50.00 per day for each worker who fails to receive the total hourly wage. Labor Code § 1775. In addition, willful violations of the prevailing wage laws may result in the debarment of a contractor from public works for a period of up to three years. Labor Code § 1777.1.

Petitioners J.R. Roberts Corporation and WSB Electric, Inc. brought this action in 1989 to enjoin the State from enforcing its prevailing wage laws. At that time, the State utilized the "line-by-line" method, whereby the total prevailing rate of per diem wages consisted of a base cash wage, money paid directly to an employee by means of a payroll check with all proper deductions, and set amounts for specific fringe benefits (i.e., $2.50 per hour for health, $0.55 for pension). To comply with prevailing wage laws, a contractor had to either pay the entire amount, including the specific fringe benefit totals, in cash, or pay the base cash wage and receive credit for the balance based on contributions for the specific fringe benefits. Credit could not be taken, however, for contributions that exceeded the stated amounts for each specific benefit.

The District Court for the Northern District of California found the line-by-line method to be preempted by ERISA. During the course of the litigation, however, the State replaced the line-by-line fringe benefit requirement with the current method. Following an appeal of the

District Court decision, the Ninth Circuit remanded the action for a determination as to whether the current method was also preempted.

Cross motions for summary judgment were filed in the District Court. The District Court found against the Petitioners, ruling that ERISA did not preempt the prevailing wage laws because the statutes did not require the establishment of benefit plans or mandate benefit contributions and because they do not regulate the relationship between the employer and a benefit plan or regulate the relationship between the employer and employee with respect to a benefit plan.

The Ninth Circuit affirmed the District Court decision on July 5, 1996. Citing ***Employee Staffing Services, Inc. v. Aubry***, 20 F.3d 1038 (9th Cir. 1994), the Circuit Court stated that the prevailing wage laws do "not force employers to provide any particular employee benefit or plans, to alter their existing plans, or even provide ERISA plans or employee benefits at all." App. at 14a-15a. Based on this conclusion, the Ninth Circuit held that the prevailing wage laws do not "refer" to ERISA plans since an employer's obligation to pay the prevailing wage does not depend upon the existence or operation of an ERISA plan. Reviewing the factors set forth in ***Aloha Airlines, Inc. v. Ahue***, 12 F.3d 1498 (9th Cir. 1994), the Ninth Circuit held that the prevailing wage laws do not have a "connection" with ERISA plans since the state laws do not require the establishment of a separate ERISA plan. According to the appellate court, the fact that an employer must create a separate administrative scheme and may choose to limit funding to an ERISA plan based on the state prevailing wage law was seen by the Panel as

too tenuous to support a determination that the laws are subject to preemption.

On July 19, 1996, Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, asking the Ninth Circuit to reconsider its decision based on the different interpretation of the scope of ERISA preemption found in ***Dillingham***, and because the prevailing wage laws in fact "relate to" benefit plans since the laws not only depend on existing, favored, benefit plans to determine the prevailing contribution level, but also place limits on employer credits against the prevailing wage and necessitate the creation of an administrative scheme to determine a public works contractors' entire obligation. The Petition was denied by the Ninth Circuit on August 19, 1996.

REASONS FOR GRANTING THE WRIT

This case presents the opportunity to clarify the distinction between the Supreme Court's decisions in ***New York State Conference of Blue Cross and Blue Shield v. Travelers Insurance Company***, ___ U.S. ___, 115 S. Ct. 1671 (1996) and ***District of Columbia v. Greater Washington Board of Trade***, 506 U.S. 125 (1992), by defining the scope of preemption only to laws that regulate, or purport to regulate ERISA plans, especially since the laws in question concern the State control of the funding of a plan and are not laws of general application. The Ninth Circuit erred by concluding that the prevailing wage laws do not relate to ERISA plans because the state laws,

which cannot be described as a traditional minimum wage law or a law of general application, expressly relate to and regulate employee welfare benefit plans by requiring contributions and/or payments based on existing ERISA fringe benefit plans. The laws also place administrative burdens on public works contractors to calculate the payment of direct cash wages by reference to other ERISA plans, thereby creating an incentive to vary existing plans to fit State-mandated criteria.

Further, the California laws are contrary to the underlying goal of ERISA which is to assure uniformity of law in the field of employee benefits, creates a disincentive for employers to fund their own employee welfare benefit plans, and favors local plans over national plans. Essentially, the State simply cannot determine the "prevailing" amount of contributions to fringe benefit plans, base the amount of direct cash wage on the existence of these favored local ERISA plans, and then assume the position that this method of paying the prevailing wage does not relate to ERISA plans. The State's attempt to favor certain ERISA plans over others cannot be concealed and flies in the fact of ERISA's purpose: to create a uniform body of federal law governing employee welfare benefit plans

1. THE CALIFORNIA PREVAILING WAGE LAWS "RELATE TO," AND IN FACT REGULATE, THE FUNDING OF AN EMPLOYEE WELFARE BENEFIT PLAN AND ARE THEREFORE PREEMPTED BY ERISA.

The basic principles underlying the broad reach of ERISA preemption are well settled. ERISA is a comprehensive federal statute whose purpose is to "protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans. To achieve this goal, Congress enacted ERISA's expansive preemption provision, 29 U.S.C. § 1144(a), which provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." This provision "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA." ***FMC Corp. v. Holliday***, 498 U.S. 52, 58 (1990). State law includes "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1). "The basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee welfare benefit plans." ***New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company***, ___ U.S.___, 115 S. Ct. 1671, 1677-1678 (1995).

Essential to any determination of ERISA preemption is whether a state law "relates to" an employee benefit plan. Under the preemption provision, a state law

" 'relates to' " an employee benefit plan, in the normal sense of the phrase, if it has either a connection with or a reference to such a plan. ***Delta Air Lines v. Shaw***, 463 U.S. 85, 96-97 (1983); ***Pilot Life Ins. Co. v. Dedeaux***, 481 U.S. 41, 47-48 (1987). "This reading is true to the ordinary meaning of 'relate to,' see Black's Law Dictionary 1288 (6th ed. 1990), and thus gives effect to the 'deliberately expansive' language chosen by Congress." ***District of Columbia v. Greater Washington Board of Trade***, 498 U.S. 52, 58 (1992). A state law may be subject to preemption even though the law is not specifically designed to affect such plans, or the effect is only indirect. ***Ingersoll-Rand v. McClendon***, 498 U.S. 133, 139 (1990). Further, preemption will occur even if the state law is "consistent with ERISA's substantive requirements" or was enacted to "effectuate ERISA's underlying purpose, ***Metropolitan Life Ins. Co. v. Massachusetts***, 471 U.S. 724, 739 (1985), or represent a traditional exercise of a state's police power. ***Blue Cross***, 115 S. Ct. at 1677. However, state laws which have only a "tenuous, remote, or peripheral" connection with ERISA plans, however, are not subject to preemption. ***Shaw v. Delta Air Lines***, 463 U.S. 85, 100 n.21.

In deciding ***Ingersoll-Rand***, the Supreme Court broadened the scope of the test for "related to" from "regulates and purports to regulate" to a more illusive "connection to" test. 498 U.S. at 139. However, if the law "regulates and purports to regulate," an ERISA plan, then it must fall well within the definition of "relates to" under ERISA Section 514, 29 U.S.C. 1144 (a). If a state law does not "relate to" an ERISA plan, only then it must be determined whether or not the law has a "connection to" ERISA plans. Only if the statute fails the "regulates

and purports to regulate" test must the objectives of ERISA be examined "as a guide to the scope of the state law that Congress understood would survive." ***Blue Cross***, 115 S. Ct. at 1677. In ***Blue Cross***, this Court found that a state law imposing ordinary hospital surcharges on the bills of insured patients did not have a "connection" with ERISA plans because the law neither mandated any changes in the administrative practices of the plan nor subjected the plans to conflicting regulations. Here, the state law mentions and limits direct contributions into an employee benefit plan based upon a state's preference to impose a "prevailing" benefit plan on all government contractors.

A. The Prevailing Wage Laws Regulates And Purports To Regulate ERISA Plans By Requiring Employers To Calculate Their Wage Obligations By Reference To Other Existing, Or Prevailing, ERISA Plans Which The State Deems "Prevailing."

The California prevailing wage laws "relate to" welfare plans for the purposes of ERISA preemption because they impose requirements on public works contractors that are premised on the existence of employee welfare benefit plans; under the decisions of this Court, preemption is required. The amount of direct cash wages paid to employee is calculated by the State and can only be determined by the contractor with reference to payments for employee welfare benefit plans because the total hourly prevailing wage is based on the local prevailing rate of employer payments for benefit plans. However credit can only be taken for payments up to the allowed

maximum. The "General Prevailing Rate of Per Diem Wages" is defined under 8 C.C.R. § 16000 to include the "prevailing rate of *employer payments for any or all programs or benefits*" which provide health and welfare, retirement, and other fringe benefits.

Thus, to determine the total hourly prevailing wage, other employer payments made to other ERISA plans must be referenced.[3] The law therefore goes further than merely referring to benefits. Based on these ERISA plans, the State imposes the requirement that public works contractors must pay a base hourly rate in cash, and then either match the prevailing contribution level with similar prevailing fringe benefits contributions or combine lesser contributions with additional cash wages. Under 8 C.C.R. § 16200(a)(3)(I), credit for employer payments, which are defined under 8 C.C.R. § 16000 to include "[t]he rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees . . . " can only be taken up to the determined prevailing contribution level ("No amount of credit for

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[3] Of course, this is an omission in many cases since payments into certain plans are more a function of the age and health of the participants rather than the level of benefits offered. Especially in defined benefit pension plans, when Congress has chosen to limit contributions to 25% of pay, a state's discouragement of payments up to the 25% limit may encourage plans to go unfunded or be under-funded, putting a burden on federal pension insurance regulated through the Pension Benefit Guarantee Corporation.

payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages"). By definition, this mandate regulates and purports to regulate ERISA plans.

Under this system, the total hourly prevailing wage rate consists of an established direct cash wage component ***and a fringe benefit component*** which is determined by the prevailing rate of employer payments for any or all benefit programs, including those for health and welfare, retirement, and vacations and holiday. Contractors are allowed to take a credit for fringe benefits paid into an ERISA plan up to the total fringe benefit allowance level set by the State. The total hourly rate, and not simply the cash component, must be paid in direct cash wages unless the public works contractor decides to contribute all or a portion of the fringe benefit component to a bona fide fringe benefit. 8 C.C.R. § 16200(a)(3)(I); 8 C.C.R. § 16000, "Employer Payments."

Since the amount of contributions that can be used as a credit against the total prevailing hourly wage is limited to the fringe benefit component that the State deems prevailing, the State is again regulating an ERISA program because if the total amount of contributions for employee benefits in any combination exceed the prevailing contribution level, the excess amount cannot be deducted from the total prevailing hourly wage, which forces an employer to cut its benefit contributions to its

plans.[4] While an employee's direct cash wage is dependent on the public works contractor's decision to contribute to employee welfare benefit plans, the total cash payment requirement is set by including the cost of benefits to other employers. If the contractor decides not to contribute to any plan, the total prevailing hourly wage must be paid in direct cash wages, which carries a significant tax burden.[5] If the contractor decides to contribute only a portion of the prevailing contribution level to various plans, such as for health and welfare and training, then only that portion can be credited against the total hourly wage and the difference between the contributions and the prevailing contribution level must be paid in direct cash wages along with the basic direct cash wage rate. If the contractor decides to contribute only the prevailing contribution level to employee welfare benefit plans, then only the basic hourly direct cash wage rate must be paid to the employee. Since public works construction is awarded to the lowest responsible bidder, the contractors are mandated to conform to State "benefit" payment levels.

However, if a contractor decides to contribute more than the prevailing contribution level, he or she will not be given any credit whatsoever against the total hourly

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[4] Congress deliberately chose not to limit the costs an employer can pay for medical and other types of welfare plans, perhaps realizing the medical insurance protects the employee and preserves the social safety net for those not able to work.

[5] Congress exempted employer contributions from that tax burden specifically to encourage them to establish plans. The State is now discouraging employers from taking advantage of that incentive by limiting the contractor's contributions.

wage rate for any contributions that exceed the prevailing contribution level. The employee must receive the basic hourly wage rate and the "excess" contributions are not considered toward compliance with the total hourly wage rate. Since the employee must be compensated in cash for contributions made on his or her behalf over the State mandated benefit level, the employer is discouraged from having a total fringe benefit package that exceeds state set maximums, even if ERISA would allow additional contributions.

In addition, included within the fringe benefit component of the prevailing wage is the "prevailing" amount for contributions made to apprenticeship training trust funds, ERISA plans which provide the funding for apprenticeship and other training programs.[6] California Labor Code § 1777.5, 8 C.C.R. § 16200 (a)(3)(G). This contribution, taken from wage scales found in the apprenticeship standards of existing State-approved apprenticeship programs, must be paid to a State-approved program or, if apprentices are not utilized on the public works project, directly to the California Apprenticeship Council, the agency certified by the U.S. Department of Labor, Bureau of Apprenticeship and Training to regulate apprenticeship training in California. 8 C.C.R. §§ 230.1 and 230.2. The prevailing wage laws thereby affect the funding of ERISA plans by mandating a set contribution to a training trust fund in total disregard

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[6] This fact may have been inadvertently misstated by Counsel for the State of California during oral argument in the ***Dillingham*** case. In fact, 8 C.C.R. § 208 specifically regulates funding of apprenticeship programs.

for a specific program's contribution rates as set forth in the program's standards or the trust agreement of the training trust.

Laws of this nature have been found to be preempted by ERISA. In ***Associated Builders and Contractors v. Baca,*** 769 F.Supp. 1537 (N.D. Cal. 1991), ***affd. on other grounds sub nom. Chamber of Commerce v. Bragdon,*** 64 F.3d 497 (9th Cir. 1995), the District Court ruled that the same laws at issue in this action were preempted by ERISA. The prevailing wage laws were incorporated into a local ordinance which conditioned the issuing of building permits on private construction projects on the payment of prevailing wages. The court found that: a) the laws related to ERISA plans because the definition of per diem wages necessitated reference to, and calculation of, fringe benefit contributions to ERISA plans (***id.*** at 1547); b) contractors were forced to create an on-going administrative scheme to calculate wages and benefits paid to individual workers and to determine the cash equivalent of provided benefits; c) employers were "forced to calculate wages and benefits on covered projects separately from other projects, creating an ongoing administrative system." (***id.*** at 1547); and d) they imposed a disproportionate impact on the benefits of various employees. The Court concluded that the "equivalent cost of fringe benefits to the employees may be of lesser value to the employees than the benefits themselves." ***Id.*** at 1547.

Baca was followed by the Eastern District of Michigan in ***Associated Builders and Contractors v. Perry,*** 869 F. Supp. 1239 (E.D. Mich. 1994), where the court found

that the Michigan prevailing wage laws,[7] which operates in the same manner as the California laws, was preempted by ERISA. Michigan prevailing wages and fringe benefit requirements are determined from a survey among local construction unions. Non-union contractors must utilize local union rates and job classification systems. Contractors must make hourly calculations if they wish to obtain credit for existing fringe benefits paid on other than an hourly basis, which is generally found in collective bargaining agreements. The Michigan law further applies an "excess benefit cap," which precludes a contractor from receiving credit for any fringe benefits that exceed the prevailing union fringe benefit rates. Contractors are also required to keep accurate records regarding wages and benefits paid to employees.

The District Court first found that the excess benefit cap was preempted by ERISA as it first dictated and/or restricted an employer's choice of ERISA benefit plans since employers are subject to "additional burdensome administrative calculations" and are "forbidden to substitute benefits under ERISA plans for cash wages above a certain benefit level." ***Id.*** at 1246. Further, the court found the administrative requirements of the law, "establishing rules for the calculation of benefits to be paid, and imposing remedies for alleged misconduct arising from the administration of plans" (***id.*** at 1249) related to ERISA plans "because it dictates and restricts the choices of ERISA plans with regard to reporting and administration." ***Id.*** at 1248.

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[7] Mich. Comp. Laws § 408.551, *et seq.*

Another ground for preemption was that the law's administrative requirements impermissibly subjected ERISA plans to conflicting regulations. "In the instant case, various states could – under the defendant's ruling – enact differing prevailing wage laws with dissimilar administrative requirements. Allowing such laws to stand would 'impair the ability of a[n ERISA] plan to function simultaneously in a number of states.' [Citation]" ***Id.*** at 1249.

Finally, the District Court, citing the Supreme Court's decision in ***District of Columbia, supra, v. Greater Washington Board of Trade, supra,*** 498 U.S. 52, held that the Michigan law expressly referred to ERISA plans, and thus were subject to preemption, because prevailing fringe benefits were determined by reference to existing ERISA (union) plans and because all contributions were required to be made to an identified fund, plan, or program. ***Perry,*** 869 F. Supp. at 1250. See also ***General Electric v. Dept. of Labor,*** 891 F.2d 25, 27 (2nd Cir. 1989) (prevailing law that required employers "to bring their pensions and welfare plans into conformity with those prevailing in the locality . . . or to make up the difference to cash payments to their employees" preempted by ERISA); ***City of Des Moines v. Master Builders of Iowa,*** 498 N.W.2d 702, 1 Wage & Hour Cas. 2d (BNA) 688 (Iowa 1993) (city ordinance requiring the payment of "not less than the current applicable prevailing wage and fringe benefit, as published in the Federal Register" preempted by ERISA); ***District Council v. James McHugh Construction Co.,*** 596 N.E.2d 19, 30 Wage & Hour Cas. (BNA) 1653 (Ill. App. Ct.

1992) (claim under Illinois Prevailing Wage Act for prevailing wages preempted by ERISA because amount of wages based on fringe benefit contributions).

States may perform their traditional role of regulating wages either by establishing a minimum wage only without reference to or credit for any fringe benefit contribution or adopting the federal Davis-Bacon system of measuring the "total package" or costs to employ, without a wage/fringe ratio limitation. In ***Keystone Chapter, Associated Builders and Contractors v. Foley***, 37 F.3d 945 (3rd Cir. 1994), ***cert. den.*** 115 S. Ct. 1393 (1995), the Third Circuit held that Pennsylvania's prevailing wage law, similar to California's, did not relate to ERISA plans and therefore escaped preemption because the State adopted a "total package" approach which gave credit for any and all fringe benefit contributions. Since the employer was not required to establish an ERISA plan in order to comply with the law and no reference was made to any particular benefit or benefit contribution, the state could honestly state that "[t]he benefits component only relates to ERISA plans when an employer decides to satisfy it through contributions to ERISA plans instead of cash payments or contributions to non-ERISA benefits." 37 F.3d at 960. See also ***Minnesota Chpt. of Associated Builders and Contractors v. Minnesota Dept. of Labor***, 47 F.3d 975, 979-980 (8th Cir. 1995).

However, this Court has rejected the notion that a state statute which relates to an ERISA covered plan might survive ERISA preemption merely because an employer has the option of avoiding the impact on its employee benefit plans by satisfying statutory obligations, through non-ERISA alternatives. In ***District of***

Columbia, supra, the Court found preempted by ERISA a District of Columbia law requiring employers providing health insurance coverage to provide equivalent health benefits for injured employees eligible for workers' compensation benefits. ERISA specifically excludes workers' compensation benefits from its preemption provisions. 29 U.S.C. § 1003(b)(3). The Court of Appeals in *District of Columbia* had found the statute preempted in part because "[b]y tying the benefit levels of workers' compensation plans to those provided in an ERISA covered plan, 'the [statute] could have a serious impact on the administration and content of the ERISA covered plan.' " 506 U.S. at 129 (quoting *Greater Washington Board of Trade v. District of Columbia*, 948 F.2d 1317, 1325 (D.C. Cir. 1991)). The Supreme Court affirmed, holding that by "specifically referring to welfare benefit plans regulated by ERISA," the statute was preempted. *Id.* at 130. The fact that the provision simply referred to an ERISA plan provided the basis for preemption. "[A]ny state law imposing requirements by reference to such covered programs must yield to ERISA." *Id.* at 130-131. As with the workers' compensation law at issue in *District of Columbia*, the two-tier method refers to employee welfare plans and are subject to ERISA preemption because they impose requirement on public works contractors which are premised on the existence of such plans. According to the District Court in *Perry, supra*, 869 F. Supp. at 1246:

> The Keystone court did precisely what the Supreme Court stated it could not do in Greater Washington: It engrafted a two-step analysis onto a one-step statute, first finding that the benefits component of the prevailing wage act had "some connection" to (i.e., was related to)

> employee benefit plans, then finding no preemption because employers could comply with the law by not paying any benefits if they paid a sufficiently high cash wage. This court rejects the Keystone court's two-step analysis.

The only issue to be determined is whether the California prevailing wage "refers to" ERISA employee benefit plans, since this Court finds ERISA preemption of state laws impacting employee benefit plans notwithstanding that the law could be complied with through means outside of ERISA. Therefore, there is no legal or logical basis to conclude that California's prevailing wage laws, which specifically references employee benefit plans, should not be preempted by ERISA merely because an employer may have the "option" of ignoring its contributions to employee benefit plans and satisfying its obligations under the Act by paying benefit rates in wages.

B. The California Prevailing Wage Laws Are Preempted By ERISA Because They Create Ongoing Administrative Burdens For Public Works Contractors.

Courts "have not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." ***Fort Halifax Packing Company v. Coyne***, 482 U.S. 1, 10 (1987). California construction contractors working on public projects are continually faced with "the task of coordinating complex administrative activities" based on the State's "patchwork scheme of regulation" to the extent that contractors are subject to different laws regarding the calculation of

the value of their benefits when working across state, and even county, lines. Because the State's prevailing wage law determines the value of benefits on a county-by-county basis, according to which collective bargaining agreement is in place, employers are subject to conflicting regulations with respect to the calculation of their own employee benefits even if one job may be in San Francisco and another in Fresno, since the total hourly prevailing wage is generally taken directly from the applicable collective bargaining agreement in force in that geographic location, non-union contractors are forced to calculate benefit levels according to trade union jurisdiction in connection with the specific type of work that an employee is performing on a state public works project. The effect of this law is especially egregious when employees perform different types of work on a single project since the contractor must pay the employee according to the collective bargaining agreement which claims the work. This type of on-the-job segmentation results in the requirement that an employer calculate each individual employee's benefit level upon the intermittent changing of job classifications, an impossibility for a non-union, qualified pension plan under ERISA. Certainly, the administrative burdens of the two-tier method is obvious when a contractor must refer to its benefit plans (or even the lack of such plans) to determine the amount of cash wages that must be paid to employees. According to the District Court in ***Baca***, interpreting the same laws at issue here:

> Complex calculations are required to determine the prevailing base wage that must be paid. The calculations can only be made after referencing

> the dollar value of benefits paid. Thus, the wage requirement incorporates employee benefits into the prevailing wage statute. This incorporation can only be accomplished by requiring per diem wages that "refer to" and "regulate" employee benefit plans. ***Baca***, 769 F.Supp. at 1547.

The Ninth Circuit recognized the burdens demanded by the prevailing wage laws in ***ABC National Line Erection Apprenticeship Training Trust***, 68 F.3d 343 (9th Cir. 1995), where the court held that an apprenticeship training trust fund has standing under ERISA to challenge California's prevailing wage laws. The trust sought to preempt California Labor Code § 1777.5, which requires that public works contractors pay a training contribution (an Employer Payment under 8 C.C.R. § 16000 which can be credited against the total hourly prevailing wage) to either a State-approved apprenticeship program or the California Apprenticeship Council. Relying on ***Dillingham***, the Court found that the California statute "related to" ERISA plans because it favored State approved ERISA plans over other ERISA plans and required contractors to either use an apprentice from a State-approved program or "utilize a complicated accounting system in order to pay into an unapproved program." ***Line Erectors***, 68 F.3d at 346. The court distinguished the decision in ***Blue Cross, supra***, 115 S. Ct. 1671 by finding that a common hospital surcharge on patients with commercial insurers did not equate with the prevailing wage requirement that forced public works contractors to either utilize State-approved program or "undertake a complicated set-off procedure to equalize the payment." ***Line Erectors***, 68 F.3d at 346-347.

Without question, the California prevailing wage laws demand the creation of an administrative scheme that directly impacts ERISA plans. The focus of the laws are not on the base cash wage, but on the fact that the total wage required includes the cost of ERISA benefits plus the fact that the State limits credit for contributions to a benefit plan to the local prevailing benefit contribution amount. To simply assert that ERISA plans are not implicated in this scheme is too narrow an interpretation of ERISA's broad preemption provision and completely fails to even remotely address the most significant employer interests protected by ERISA. According to this Court in ***Fort Halifax***, 482 U.S. at 11:

> ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulations would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

The prevailing wage laws therefore contradict ERISA's stated goal to ensure that plans and plan sponsors be subject to a uniform body of benefits law. ***Ingersoll-Rand***, 498 U.S. at 142. As such, the Ninth Circuit's decision must be reviewed and reversed.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: November 19, 1996, San Francisco, California

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WSB ELECTRIC, INC. and J.R. ROBERTS CORPORATION, *Plaintiffs-Appellants,* v. JAMES CURRY, in his official capacity as the Labor Commissioner of the State of California; RONALD RINALDI, Director of Industrial Relations for the State of California, *Defendants-Appellees.*	No. 94-16613 D.C. No. CV-90-00771-CW
J.R. ROBERTS CORPORATION, *Plaintiff-Appellant,* v. JAMES CURRY, Labor Commissioner of the State of California; RONALD RINALDI, Director of Industrial Relations for the State of California, *Defendants-Appellees.*	No. 94-16646 D.C. No. CV-90-01109-CW OPINION

Appeals from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
December 5, 1995 – San Francisco, California

Filed July 5, 1996

Before: James R. Browning, William C. Canby, Jr., and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Hall

SUMMARY

Labor and Employment/Compensation/ERISA

The court of appeals affirmed a district court judgment. The court held the California prevailing wage provisions for public works contracts are not preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

Appellants WSB Electric, Inc. and J.R. Roberts Corp. are licensed contractors who perform public works contracts in California. They sued the California Department of Industrial Relations (DIR) and its officers, challenging the State's enforcement of its prevailing wage law for public works contracts. The State's prevailing wage law requires that public works contractors pay their employees a minimum wage, called the "prevailing rate of per diem wages." The prevailing wage is determined on a county-by-county basis and is calculated by adding the basic hourly rate paid to the majority of workers in a particular job classification plus the prevailing costs to

employers of fringe benefits provided in that locality. Under the "two-tier" approach, an employer must pay employees the prevailing wage, and it may do so through a combination of cash and benefits. To calculate the wage, the employer adds the hourly cash wage paid plus the total amount of employer contributions to benefit plans. If the sum falls short of the prevailing wage, the employer must make up the difference in cash. An "excess benefit cap" applies, whereby employers may not credit more than a fixed amount of benefits contributions toward the prevailing wage. WSB and Roberts claimed that the state law is preempted by ERISA because California's prevailing wage rate is measured by reference to the prevailing cash wage plus the prevailing benefits contributions of employers in a given locality.

The district court found that ERISA does not preempt the prevailing wage statute. WSB and Roberts appealed.

[1] The ERISA preemption clause establishes as an area of exclusive federal concern the subject of every state law that relates to an employee benefit plan governed by ERISA. [2] A state law relates to an ERISA employee benefit plan if it has either a "connection with" or "reference to" such a plan.

[3] Regulation of wages per se is not within ERISA's coverage. [4] In this case, the prevailing wage law provisions at issue regulate wages generally, not wages that are part of a particular employee benefit plan.

[5] California's prevailing wage rate is measured by reference to prevailing cash wages and prevailing benefit contributions in a locality. Employee benefits and benefit plans are mentioned in the statute and regulations in two

different respects. Provisions require the DIR to consider the prevailing level of benefit contributions by employers in a given locality. [6] However, a statute "refers to" an ERISA plan *and* has some effect on the referenced plans. [7] The references to ERISA plans in the California prevailing wage law have no effect on any ERISA plans, but simply take them into account when calculating the cash wage that must be paid. The scheme does not force employers to provide particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all. [8] California's prevailing wage law is concerned with guaranteeing a minimum cash wage for employees on public works contracts. Although the prevailing rate of per diem wages in a given locality is measured by reference to employers' fringe benefit costs, those costs are calculated without regard to whether they consist of contributions to ERISA plans. Moreover, each individual employer's obligation to pay the prevailing wage does not depend on the existence or operation of that employer's ERISA plans. Thus, California's prevailing wage law does not refer to ERISA plans sufficiently for a finding that it is preempted.

[9] Under the two-tier approach, California's prevailing wage law does not regulate the types of benefits of employee welfare benefit plans. [10] In addition, the two-tier scheme does not impose any additional burden on ERISA plans or require the employer to take any action with regard to those plans. [11] Employers can comply without adjusting their level of benefits contributions, [12] and the law does not require that employers maintain a separate employee benefit plan. [13] Although California's prevailing wage law may discourage employer

benefit contributions greater than the excess benefits cap, that effect is not sufficient by itself to find ERISA preemption. [14] California is not telling employers how to writ their ERISA plans, nor is it conditioning some requirement on how individual employers write their ERISA plans. Instead, it is telling employers that regardless of how they write their ERISA plans, or even whether they have ERISA plans at all, they must pay the prevailing wage, and they may do so through some combination of cash and benefits. Under either relevant test, California's prevailing wage law does not have a sufficient connection to find that the statute is preempted.

[15] California's prevailing wage law does not refer to or have a connection with ERISA plans sufficient to find that it "relates to" such plans. The prevailing wage provisions of California's statute are not preempted by ERISA.

COUNSEL

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John M. Rea, Department of Industrial Relations, San Francisco, California, for the defendants-appellees.

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OPINION

HALL, Circuit Judge:

Appellants WSB Electric and J.R. Roberts are licensed contractors who perform public works contracts in the state of California. They brought suit against the California Department of Industrial Relations ("DIR") and its officers challenging the state's enforcement of its prevailing wage law for public works contracts, Cal. Labor Code § 1770 et seq. They claim that the state law is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because California's prevailing wage rate is measured by reference to the prevailing cash wage plus the prevailing benefits contributions of employers in a given locality.

The district court found that ERISA does not preempt the prevailing wage statute, and appellants filed a timely appeal. We affirm.

I

This case originally began in 1989, when both contractors filed separate actions to enjoin the DIR from enforcing California's prevailing wage law for state public works projects. The state's prevailing wage law requires that public works contractors pay their employees a minimum wage, called the "prevailing rate of per diem wages." Cal. Labor Code §§ 1771 & 1773. This prevailing wage is determined on a county-by-county basis, and is calculated by adding the basic hourly rate paid to the majority of workers in a particular job classification plus the prevailing cost to employers of fringe

benefits provided in that locality. In 1989, DIR enforced the prevailing wage law according to the "line-by-line" method. Under this approach, the total prevailing wages consisted of a base cash wage plus set amounts for specific fringe benefits (i.e., $2.50 per hour for health, $0.50 for pension, etc.). To comply with the law, a public works contractor had to either pay the entire prevailing wage in cash, or pay the base cash wage and receive credit for the balance based on contributions for specific fringe benefits. The employer could not, however, take credit for fringe benefit contributions that exceeded the stated amount for each specific benefit.

The district court found that this scheme was preempted by ERISA. Subsequently, the DIR adopted the current system, a "two-tier" approach, and we vacated the district court's decision and remanded for further proceedings as to whether ERISA also preempts the "two-tier" approach. On remand, the district court granted the DIR's motion for summary judgment, holding that ERISA does not preempt the two-tier approach. The contractors appealed, and that is the case before us now.

Under the two-tier approach, the employer must pay employees the prevailing wage, and it may do so through a combination of cash and benefits. To calculate the wage, the employer adds the hourly cash wage paid plus the total amount of employer contributions to benefits plans, no longer considering each benefit separately. If this sum falls short of the prevailing wage, then the employer must make up the difference in cash. However, as before, the Labor Code also prescribes a minimum amount of cash wage that must be paid. Therefore, an "excess benefit cap" applies, whereby employers may not credit more

than a fixed amount of benefits contributions toward the prevailing wage. If the employer contributes more than the fixed amount for benefits, it is not credited in the prevailing wage calculation and the employer must make up any shortfall in cash.

II

The district court's decision regarding preemption is reviewed de novo. *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir. 1994). A grant of summary judgment is reviewed de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law. *Id.* In this case, both sides concede that there are no disputed issues of fact; therefore, the only inquiry is whether the district court correctly applied the substantive law.

[1] Congress enacted ERISA, 29 U.S.C. § 1001 et seq., as a comprehensive legislative scheme "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). By enacting such a broad scheme, Congress also sought to protect employers by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* at 99. To further this goal of nationwide consistency, Congress included a preemption clause,[1] section 514(a), which is "conspicuous

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[1] Section 514(a) provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any

for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). ERISA's preemption provision is not without limits, however; we "must presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

[2] A state law relates to an ERISA employee benefit plan "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671, 1677 (1995). ERISA preempts state laws that relate to employee benefit plans even if they only indirectly affect those plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). Nevertheless, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n. 21; *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1504 (9th Cir. 1993).

A

[3] It is well settled that wages are a subject of traditional state concern, and are not included in ERISA's definition of "employee benefit plan." Thus, regulation of

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employee benefit plan." 29 U.S.C. § 1144(a); *see also* 29 U.S.C. § 1002(1) (defining employee benefit plans).

wages per se is not within ERISA's coverage. *Massachusetts v. Morash*, 490 U.S. 107, 118 (1989) (holding that ERISA does not preempt a state law regulating vacation pay).

No doubt is cast on this proposition by our recent decision in *Dillingham Construction v. County of Sonoma*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 1415, 134 L.Ed.2d 541 (1996). In *Dillingham*, the plaintiffs challenged the apprenticeship program provisions of California's prevailing wage law, Cal. Labor Code § 1777.5. We held that a statute regulating wages in an apprenticeship program was preempted by ERISA because the apprenticeship program itself was an employee welfare benefit plan. *Id.* at 718. Therefore, the prevailing wage law apprenticeship provisions directly "related to" an ERISA plan. *Id.* at 718-19; *see also Inland Empire Chap. of Assoc. General Contractors v. Dear*, 77 F.3d 296 (9th Cir. 1996) (holding that ERISA preempts Washington's prevailing wage law's apprenticeship provisions for the reasons given in *Dillingham*).

[4] Here, the prevailing wage law provisions at issue regulate wages generally, not wages that are part of a particular employee benefit plan. The question for decision, then, is whether the statute's effect on employee benefit plans is so attenuated that the statute cannot be said to "relate to" ERISA plans.

B

A state law relates to an ERISA employee benefit plan if it has either "a connection with" or "reference to" such a plan. *Shaw*, 463 U.S. at 97; *Travelers*, 115 S. Ct. at

1677 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992). Few cases discuss the application of the "reference to" language from the *Shaw* test, and some courts seem to merge the two prongs. *See NYS H.M.O. Conference v. Curiale*, 64 F.3d 794, 800 n. 17 (2nd Cir. 1995). But in *Travelers*, the Supreme Court expressly applied a two-pronged analysis, holding first that the statute at issue did not "refer to" ERISA plans, and then concluding that it also did not have a sufficient "connection with" such plans to warrant preemption. *Travelers*, 115 S. Ct. at 1677.

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The scope of the "reference to" language is open to varying interpretations. Some courts have found that statutes which merely make mention of ERISA plans, or allude to them obliquely, are preempted under this prong of the *Shaw* test. *E.g., Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991)[2] (holding that California's prevailing wage law as applied to *private* construction projects is preempted by ERISA because the prevailing wage rate is calculated in part by referring to the dollar value of benefits paid in the locality), *aff'd on other grounds sub nom. Chamber of Commerce v. Bragdon*, 64

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[2] *But see Associated Builders and Contractors v. Curry*, 797 F.Supp. 1528, 1537-38 (N.D.Cal.1992) (holding that the same California statute at issue in *Baca* is not preempted by ERISA, otherwise it "would vitiate, without any discernable [sic] legislative intent or purpose, the state's traditional power to regulate wages and to establish and enforce other labor standards"), *vacated*, 68 F.3d 342 (9th Cir.1995) (remanding for decision in light of *Dillingham*).

F.3d 497 (9th Cir. 1995) (holding that the NLRA preempts application of California's prevailing wage law to private construction projects, and not reaching the question of ERISA preemption); *Associated Builders & Contractors v. Perry*, 869 F. Supp. 1239 (E.D. Mich. 1994) (holding that Michigan's prevailing wage law, which operated similarly to California's "two-tier" method, was preempted by ERISA).

Appellants argue that under Greater Washington the prevailing wage law is preempted because the employer's obligations are measured by reference to ERISA plan benefits. In Greater Washington, the pre-empted statute expressly referred to an ERISA covered plan – it required all employers who provide employee health insurance coverage, to also provide equivalent coverage for employees receiving worker's compensation benefits. *Greater Washington*, 113 S. Ct. at 583-84. This statute referred to ERISA plans in the literal sense, in that it specifically mentioned a covered employee welfare plan (medical coverage). But more importantly, it referred to the level of benefits provided by a covered plan when prescribing the additional coverage required. That is, it imposed an obligation upon an employer that was "measured by reference" to the level of benefit provided by that employer under an ERISA plan. *Id.* at 583-84. The Court explained that "any state law imposing requirements by reference to such covered programs must yield to ERISA." *Id.* at 584; *see also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829-30 (holding that a state garnishment statute that expressly referred to ERISA plans and singled them out for different treatment under the law was preempted).

[5] California's prevailing wage rate is measured by reference to prevailing cash wages and prevailing benefit contributions in a locality and, thus, would seem to fall under Greater Washington. Employee benefits and benefit plans are mentioned in the statute and regulations in two different respects. First, the calculation of per diem wages includes "employer payments for health and welfare, pension, vacation, travel time, and subsistence pay." Cal. Labor Code § 1773.1. The regulation defining how the employer determines the amount of credit he can deduct for fringe benefit costs, Cal. Code Regs. tit. 8, § 16200(a)(2)(I), refers to "employer payments," which include "[t]he rate of contribution irrevocably made by a contractor or subcontractor . . . pursuant to a fund, plan, or program for the benefit of employees. . . . "[3] Cal. Code Regs. tit. 8, § 16000 (definition of "Employer Payments"). Second, other provisions of the statutory scheme describe the method by which the DIR is to determine the prevailing wage in a particular area. These provisions require the DIR to consider the prevailing level of benefit contributions by employers in a given locality. Cal. Labor Code § 1773; Cal. Code Regs. tit. 8, § 16200; Cal. Code Regs. tit. 8, § 16000 (definition of "Prevailing Rate" and "General Prevailing Rate of Per Diem Wages").

[6] The Supreme Court, however, has never found a statute to be preempted simply because its text included

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[3] The regulations also include anticipated employer costs for providing benefits not administered by a fund, plan, or program. In other words, "employer payments" also includes the costs of benefits not provided through an ERISA plan. Cal. Code Regs. tit. 8, § 16000.

the word ERISA or explicitly mentioned a covered employee welfare benefit plan. *See NYS H.M.O. Conference*, 64 F.3d at 799-800. Although the statutes the Supreme Court has held to be preempted did expressly refer to ERISA plans, they also had some effect on those plans. *See, e.g., Greater Washington*, 113 S. Ct. at 583 (noting that the Court of Appeals had found that the preempted statute "could have a serious impact on the administration and content of the ERISA-covered plan"). Therefore, a statute "refers to" an ERISA plan and is preempted if it mentions or alludes to ERISA plans, *and* has some effect on the referenced plans. *See also Thiokol Corp. v. Roberts*, 76 F.3d 751, 759-60 (6th Cir. 1996) (holding that a state tax law is not preempted even though it specifically refers to employee benefits plans when defining employee "compensation," and noting that "statutes that refer to ERISA plans are struck down not because of the reference but because of their intended effect" on those plans); *NYS H.M.O. Conference*, 64 F.3d at 800 ("a state law has a reference to ERISA if its text mentions or alludes to ERISA plans, and if the law affects ERISA plans in some manner").

[7] The references to ERISA plans in the California prevailing wage law have no effect on any ERISA plans, but simply take them into account when calculating the cash wage that must be paid. At most, this scheme provides examples of the types of employer contributions to benefits that are included in the wage calculation.[4] The

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[4] Otherwise, with no guidance as to what constitutes an employee benefit, employers could devise all sorts of clever benefit plans – for example, air conditioning or heating in the workplace could be considered an employee benefit.

scheme does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all. *See Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038, (9th Cir. 1994) ("In the case at bar, unlike Greater Washington, the state law does not tell employers how to write their ERISA plans."). These provisions are enforced regardless of whether the individual employer provides benefits through ERISA plans, or whether the benefit contributions in a given locality are paid to ERISA plans. *See, Travelers*, 115 S. Ct. at 1677 (holding that a statute did not "refer to" ERISA plans because it operated regardless of whether the medical coverage was secured by an ERISA plan or otherwise).

The Third and Eighth Circuits have both held that similar prevailing wage statutes were not preempted by ERISA. In *Keystone Chapter of Assoc. Builders v. Foley*, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995), the Third Circuit rejected the argument that the mere mention of benefits or benefit plans in a statute automatically demands preemption. The court noted that the statute at issue did not premise any employer obligation on the existence of benefits plans, but instead merely took account of such plans if they happened to exist. *Keystone*, 37 F.3d at 957 (holding that ERISA does not preempt a prevailing wage statute that operates identically to California's current "two-tier" approach); *see also Minnesota Chapter of Assoc. Builders v. Minnesota Dept. of Labor*, 47 F.3d 975 (8th Cir. 1995) (holding that ERISA does not preempt a prevailing wage statute similar to California's, but which may not have an excess benefits cap). The *Keystone* court distinguished *Greater Washington* because

in that case the statute referred to ERISA plans as the basis for the rights it accorded, whereas in Pennsylvania's prevailing wage statute, which is similar to California's, an ERISA plan benefit is given only as an example of the factors that make up the prevailing wage. *Id.* at 957 n. 17; *Minnesota Chapter*, 47 F.3d at 980 ("ERISA does not require 'a state to ignore the existence of ERISA benefits when considering overall remuneration to workers,' and 'a state can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,' without triggering ERISA preemption.") (citation omitted); *see also Thiokol*, 76 F.3d at 753 & n. 1 (holding that a state tax law is not preempted, even though it bases an employer's tax obligation upon employee compensation, which includes employers' payments to retirement and health benefit plans).

[8] California's prevailing wage law is concerned with guaranteeing a minimum cash wage for employees on public works contracts. Furthermore, it takes into account those contractors who provide fringe benefits for their employees. Otherwise, these contractors would be unable to compete effectively for public works contracts against contractors who provide only a cash wage. Although the prevailing rate of per diem wages in a given locality is measured by reference to employers' fringe benefit costs, these costs are calculated without regard to whether they consist of contributions to ERISA plans. Moreover, each individual employer's obligation to pay the prevailing wage does not depend upon the existence or operation of that employer's ERISA plans. Therefore, California's prevailing wage law does not refer

to ERISA plans sufficiently for us to find that it is preempted.

2

This court has defined a set of factors to consider when determining whether a state law relates to ERISA plans because it has a "connection with" such plans:

> (1) Whether the state law regulates the types of benefits of ERISA employee welfare benefit plans;
>
> (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law;
>
> (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans;
>
> (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between an employer and employee.

Ahue, 12 F.3d at 1504 (holding that a state law requiring that employers cover the expense of federally mandated physicals for airline pilots is preempted by ERISA).

[9] Under the two-tier approach, California's prevailing wage law clearly does not regulate the types of benefits of employee welfare benefit plans; therefore, the first *Ahue* factor is not implicated.

[10] Under *Ahue* factors (2) and (3) a state law may "relate to" ERISA plans if it requires establishment of a

separate employee benefit plan to comply with the law or if it imposes additional administrative requirements for ERISA plans. *Ahue*, 12 F.3d at 1504. Appellants confuse and combine these two factors when they argue that this statute is preempted because it imposes additional administrative burdens regarding benefits contributions on *the employer*. Because the two-tier scheme does not impose any additional burden on ERISA plans or require the employer to take any action with regard to those plans, we reject this argument.

Relying on *Perry* and *Baca*, appellants contend that public works contractors will be required to create a separate administrative scheme in order to: (1) perform ongoing calculations of wages paid and cash equivalents of benefits provided; (2) keep track of the prevailing wage levels in different localities; and (3) maintain detailed payroll records showing hourly wage levels and benefit contributions. *See* Cal. Labor Code § 1776 for disclosure and reporting requirements. *See Perry*, 869 F. Supp. at 1248 (holding that similar calculations and reporting requirements would "impair the ability of a plan to function simultaneously in a number of states."); *Baca*, 769 F. Supp. at 1547 ("employers will be forced to calculate wages and benefits on covered projects separately from other projects, creating an ongoing administrative system").

[11] None of these concerns satisfies either *Ahue* factor (2) or (3). First, nothing in California's scheme requires the establishment of a separate benefit plan in order to comply with the state law. California's statute does not require public works contractors to modify their benefits plans at all. It simply requires that they pay a

minimum cash wage, regardless of the level of benefits provided. Employers can comply without adjusting their level of benefits contributions.

[12] Furthermore, although the law may cause employers to maintain a separate administrative scheme to keep track of prevailing wage data for public works projects, it does not require that they maintain a separate employee benefit plan. They may choose to do so if they want to ensure that they contribute no more to employee benefits than the maximum credited under the excess benefit cap. But they are not required to do so. If their benefit contributions fall below the prevailing benefit rate, then they can make up the shortfall with cash wages, which would have no effect on their ERISA plans.

Admittedly, if employers' benefits contributions exceed the prevailing benefit rate, then they would quite likely adjust their contributions downward to reflect the prevailing rate. In that case, the prevailing wage law would have an incidental impact on ERISA plans. But this impact is indirect, and the choice of amount and type of benefits to provide remains with the private employers.

Under *Ahue* factor (4) the main focus of appellants' argument is that the excess benefits cap of the two-tier scheme discourages employers from making benefits contributions in excess of the prevailing benefit rate, thereby affecting the relationship between the employer and employees. They argue that the excess benefit cap creates an adverse economic impact on public works contractors, which discourages benefits contributions in excess of the cap. However, we have rejected this argument in *Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038 (9th

Cir. 1994). We held that ERISA did not preempt a state law that required employers to provide separate workers' compensation insurance even if they included coverage for work-related injuries under a comprehensive ERISA plan. The plaintiffs argued that the independent state requirement would have the economic effect of discouraging them from providing "so rich an ERISA plan as they do now." *Id.* at 1042. We rejected this argument pointing out that "[t]he economic effect of independent state requirements on employers' incentives in drafting ERISA plans should be distinguished from the legal effect of state commands regarding ERISA plans." *Id.*; *Travelers*, 115 S. Ct. at 1679 ("An indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself"); *see also Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (holding that California laws prohibiting employment discrimination are not preempted by ERISA, and noting that merely increasing an ERISA plan's operational costs is too tenuous, remote or peripheral an effect to warrant a finding that the law relates to a covered plan). Any requirement that an employer spend a fixed amount on wages would reduce the general funds available for other methods of employee compensation. *See Travelers*, 115 S. Ct. at 1679 ("Even basic regulation of employment conditions will invariably affect the cost and price of services."). But "ERISA does not preempt cash wage requirements unrelated to employee benefits, nor does it require the state to encourage benefits contributions by reducing the minimum cash wage where an employer makes large benefits contributions." *Keystone*, 37 F.3d at 959.

[13] Although California's prevailing wage law may discourage employer benefit contributions greater than the excess benefits cap, this effect is not sufficient by itself to find ERISA preemption. After all, a cash-only prevailing wage law, which clearly would not be preempted, would more severely discourage benefits contributions than the current scheme. The economic effect of the current scheme is too tenuous, remote or peripheral to support a finding that the law "relates to" employee benefit plans.

[14] In *Employee Staffing* we set forth a simplified test for determining whether a law "relates to" ERISA plans for preemption purposes:

> Is the state telling employers how to write their ERISA plans, or conditioning some requirement on how they write their ERISA plans? Or is it telling them that regardless of how they write their ERISA plans, they must do something else outside and independently of the ERISA plans? If the latter . . . there is no preemption.

Employee Staffing, 20 F.3d at 1041. In the current case, California is not telling employers how to write their ERISA plans. Nor is it conditioning some requirement on how individual employers write their ERISA plans. Instead, it is telling employers that regardless of how they write their ERISA plans, or even whether they have ERISA plans at all, they must pay the prevailing wage, and they may do so through some combination of cash and benefits. Under either test as to whether a statute has a connection with ERISA plans, California's prevailing wage law does not have a sufficient connection to find that the statute is preempted.

[15] In conclusion, California's prevailing wage law does not refer to or have a connection with ERISA plans sufficient to find that it "relates to" such plans. Therefore, the prevailing wage provisions of California's statute are not preempted by ERISA.

III

California's prevailing wage law has some connection to employee benefits and, therefore, has some connection, however indirect, to employee benefit plans. Nevertheless, we hold that this connection is not sufficient to find that the statute is preempted by ERISA. Therefore, we affirm the district court's judgment that ERISA does not preempt California's two-tier prevailing wage scheme.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WSB ELECTRIC, INC. and J.R. ROBERTS CORPORATION, Plaintiffs-Appellants, v. JAMES CURRY, in his official capacity as the Labor Commissioner of the State of California; RONALD RINALDI, Director of Industrial Relations for the State of California, Defendants-Appellees, and STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO; CARPENTERS-CONTRACTORS COOPERATION COMMITTEE, INC., Intervenors-Appellees.	No. 94-16613 D.C. CV-90-00771-CW

J.R. ROBERTS CORPORATION, Plaintiff-Appellant, v. JAMES CURRY, Labor Commissioner of the State of California; RONALD RINALDI, Director of Industrial Relations for the State of California, Defendants-Appellees, and STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO; CARPENTERS-CONTRACTORS COOPERATION COMMITTEE, INC., Intervenors-Appellees.	)	No. 94-16646 D.C. No. CV-90-01109-CW ORDER (Filed Aug. 21, 1996)

Before: BROWNING, CANBY, and HALL, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WSB ELECTRIC, INC.;
J.R. ROBERTS CORP.,

Plaintiffs,

v.

JAMES CURRY, in his official capacity as the Labor Commissioner of the State of California; RONALD T. RINALDI, Director of Industrial Relations for the State of California,

Defendants,

and

STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, et al.,

Intervenors.

_____/

No. C 90-00771 CW
No. C 90-01109 CW

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Aug 11, 1994)

The cross-motions of Plaintiffs and Defendants for summary judgment were heard by this Court on July 8, 1994. Mark R. Thierman and George P. Parisotto of the Thierman Law Partnership appeared on behalf of Plaintiffs WSB Electric Inc. and J.R. Roberts Corporation.

James D. Fisher of the California Department of Industrial Relations appeared on behalf of Defendants James Curry and Ronald T. Rinaldi.

Having considered the papers filed by the parties and oral argument on the motion, and good cause appearing, the Court hereby DENIES Plaintiffs' motion and GRANTS Defendant's motion for the following reasons.

A. Background and Procedural History

Each Plaintiff is a California contractor which bids on public works contracts. In 1990, each sued the California Labor Commissioner and the Director of the California Department of Industrial Relations ("DIR") under ERISA and § 1983 to enjoin the then-existing system of enforcement of the prevailing wage laws in California, and the actions were ordered related. The State Building and Construction Trades Council of California, AFL-CIO was permitted to intervene. While the actions were pending, the DIR changed its method of enforcement on an interim basis.

Judge John P. Vukasin entered summary judgment for Plaintiffs, finding the original enforcement scheme to be preempted by ERISA, although finding the § 1983 equal protection claims to be without merit. Judge Vukasin denied Plaintiffs' motion for attorneys' fees, however, as the action did not fall within the ERISA attorneys' fees statute.

The DIR adopted its interim enforcement method on a permanent basis in state regulations, but also pursued

an appeal from the judgment against it. The Ninth Circuit vacated the judgment as moot and remanded for determination of whether the new scheme is preempted.

Plaintiffs now seek summary judgment that the new scheme is preempted by ERISA, and further that they are entitled to interim attorneys' fees for the first phase of this case through the appeal. Defendants and Intervenor jointly oppose the motion and move for summary judgment in their favor.

B. Statement of Facts and Issues

The state of California requires that contractors on certain public works projects pay their employees at least the "general prevailing rate of per diem wages for work of a similar character in the locality." California Labor Code § 1771. The Director of the DIR is charged with determining the prevailing wage in the relevant locality for each type of work needed to execute a public contract. Labor Code § 1773. The definition of "per diem wages" includes the amount of employer payments for certain benefits, as well as cash wages. Labor Code § 1773.1.

Prior to October 1990, DIR enforced these statutes according to the "line by line" method. Under this approach, the DIR determined the prevailing rate of cash wages and of each specific benefit included in the statute; the total of all of these was considered the "prevailing wage." To comply with the prevailing wage laws, a contractor could either pay at least the total amount of the prevailing wages in cash wages, or pay a combination of at least the prevailing cash wages plus countable benefit contributions adding up to at least the total amount of

prevailing wages. However, for each specified fringe benefit, only contributions up to the prevailing rates for that benefit were countable. Thus contractors were not entitled to any credit for benefits which were not prevailing benefits in the area or for benefit payments in excess of the prevailing rate for that benefit. This is the scheme which Judge Vukasin held was preempted by ERISA.

The new scheme followed by DIR is dubbed the "two tier" system by Plaintiffs. Under this scheme, to be in compliance with the prevailing wage laws, a contractor could either pay at least the total amount of the prevailing wages in cash wages or pay a combination of at least the prevailing cash wages, plus benefit contributions adding up to at least the total amount of the prevailing wages. The difference from the "line by line" scheme is that legitimate statutory benefits contributions are countable even if they exceed the prevailing rates for that specific benefit or are for different benefits than the prevailing benefits. This scheme thus interferes far less with the choice of benefits and allocation of funds to benefits. However, as with the "line by line" system, a contractor is still required to pay the prevailing cash wages; it is not entitled to a credit against the prevailing cash wages for benefit payments in excess of the prevailing rate for benefits. This is the scheme being challenged in this action.

A third possible scheme, used in the federal Davis-Bacon Act, is the "total package" method. Under that method, to comply with the prevailing wage statute, a contractor could pay any combination of cash wages and benefit contributions, provided that the total adds up to the total prevailing wage determined by the government.

In other words, contractors would be entitled to credits against the prevailing cash wage rate for benefit payments in excess of the prevailing rate for benefits.

The issue framed in these cross-motions is whether the "two tier" method is preempted by ERISA. Plaintiffs concede that the state may adopt prevailing wage laws which set a floor for the tier of combined wage and benefits payments ("total package"); they further concede, as they must, that the state may set a floor for the tier of cash wages alone, regardless of benefits. However, Plaintiffs argue that the state may not do both without running afoul of ERISA.

C. Applicable Legal Standards

Summary judgment is properly granted when there are no genuine and disputed issues of material fact; or, when viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). This case is appropriate for disposition by summary judgment. There are no disputed facts. The parties seek a ruling on the legal issue of whether ERISA preempts the state's prevailing wage law scheme.

D. ERISA Preemption

ERISA preempts "any and all State laws insofar as they . . . relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a). The regulations construing ERISA

explicitly exclude wages from the definition of "employee benefit plan." 29 C.F.R. § 2510 3 - 1. The scope of ERISA preemption under § 1144(a) is extremely broad, but not unlimited.

In *Massachusetts v. Morash*, 490 U.S. 107 (1989), the Supreme Court held that a statute requiring employers to pay employees for unused accrued vacation time was not preempted by ERISA. It recognized that the definition of "employee benefit" was broad enough to encompass vacation benefits, such that the creation of a separate fund to pay vacation benefits would constitute an "employee benefit plan" and subject an employer to the regulatory provisions of ERISA. It held, however, that neither ordinary vacation benefit payments nor payment for unused vacation time constitute a "plan," reasoning as follows:

> The interpretation of § 3(1) is governed by the familiar principles that . . . "in expounding a statute, we [are] not . . . guided by a single sentence . . . but look to the provisions of the whole law, and to its object and policy. [citations omitted] In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. [citation omitted] To that end, it established extensive reporting, disclosure and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control,

> they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wage for services performed – a danger Congress chose not to regulate in ERISA.

490 U.S. at 112-15. The Court also relied upon the Secretary's definition of "benefits," noting that deference is due his reasonable views, and quoting the following from 40 Fed.Reg. 24642-24643 (1975):

> [P]aid vacations . . . are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage.

490 U.S. at 117. The promulgated regulations therefore provided that numerous "payroll practices" such as payment of vacation benefits out of an employer's general assets are not benefit plans within the meaning of ERISA. The Court noted that a contrary interpretation would have "profound consequences," including that:

> [S]uch an interpretation would . . . displace the extensive state regulation of the vesting, funding, and participation rights of vacation benefits; because ERISA's vesting and funding requirements do not apply to welfare benefit plans [citations omitted], employees would actually receive less protection if ERISA were applied to ordinary vacation wages paid from the employer's general assets. [citation omitted]

> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 19.

490 U.S. at 118-19. Obviously, payment of prevailing cash wages out of an employer's general assets without credit for higher than prevailing benefit contributions does not constitute a benefit plan within the meaning of ERISA. Plaintiff's argument is rather that such payment affects and therefore "relates to" their ERISA plans. This argument must be evaluated, however, in light of the Supreme Court's concern that the separate spheres of governmental authority be preserved.

The Ninth Circuit has recently set forth a comprehensive ERISA preemption analysis in *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (9th Cir. 1993), affirming the district court's grant of summary judgment that Hawaii's statute requiring employers to pay the cost of medical examinations mandated by federal law was preempted by ERISA. The court found that the primary purpose of ERISA is "to promote the interests of employees and their beneficiaries in employee benefit plans," quoting *Shaw v. Delta AirLines Inc.*, 463 U.S. 85, 90 (1983). Congress also intended to safeguard employers' interests by "eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans." *Id.* at 91. To ensure uniformity, ERISA includes "one of the broadest preemption clauses ever enacted by Congress." *PM Group Life Ins. v. Western Growers Assur. Trust*, 953 F.2d 543, 545 (9th Cir.

1992). The threshold question in a preemption inquiry is whether the state law "relates to" an employee welfare benefit plan, i.e. "has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97. If so, it is preempted even if it was "not specifically designed to affect such [a] plan[], or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). On the other hand, the law does not "relate to" ERISA plans if its effect on such plans is "tenuous, remote, or peripheral." *Shaw*, 463 U.S. at 100 n.21. In determining whether a state law "relates to" an ERISA plan, the following factors must be considered:

> (1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans (*Shaw*, 463 U.S. at 96-97 (state law requiring pregnancy benefits "relates to" ERISA plan); *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 766 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981) (state law requiring alcohol and drug abuse treatment benefits "relates to" ERISA employee benefit plan)); (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law (*Fort Halifax*, 482 U.S. at 12-13 (state law requiring companies to make a onetime, lump-sum severance payment when closing plants does not "relate to" an ERISA plan, since the law does not require establishment or maintenance of a plan)); (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans [citation omitted]; and (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the

> employer and employee (*General Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993) (statute subjecting trustees to personal liability for actions performed while discharging their responsibility to trust is preempted by ERISA as applied to contract entered into by trustees for ERISA trust)).

12 F.3d at 1504. Applying that test to the Hawaii statute, the court held it did "relate to" ERISA plans. The statute would require the plaintiff employer either to modify its existing health benefit plan to pay for medical examinations mandated by federal law, or to create a separate plan to provide for such benefits. Thus the statute either (1) regulated the benefits in the existing plan or (2) required the creation of a separate plan. Furthermore, the statute also (3) imposed reporting requirements to show that the obligation was met. Finally, the statute (4) regulated the relationship between the employer and its employee benefit plan and between the employer and employees mandated to have medical examinations. Accordingly, the statute directly affected and thus related to the ERISA plan. Furthermore, it did not represent a regulation of traditional state authority. Therefore, it was preempted.

Applying the *Aloha* test to the instant prevailing wage statute and enforcement scheme, no ERISA preemption can be found. The statute does not (1) regulate the types of benefits in ERISA plans, or (2) require the creation or maintenance of a separate benefit plan, inasmuch as a contractor may comply with the law without having a plan at all, simply by paying cash wages in the amount designated as the prevailing wage. As long as the

employer chooses the latter option, the statute (3) imposes no requirements on a benefit plan and (4) does not regulate the relationship between the employer and a benefit plan or regulate the relationship between the employer and employee with respect to a benefit plan.

Furthermore, even if the employer chooses to have an ERISA plan, the statute does not regulate the types or amounts of the benefits in the plan or the relationship between the employer and employee with respect to the benefit plan, nor does it impose any requirements on the plan itself. At most, the statute may have an indirect effect on the amount of benefits by discouraging payment of higher than prevailing rates of benefits among those employers who seek to comply precisely and not exceed compliance with the statute. However, the choice of the amount of benefits remains fully with the private parties. If the employer seeks credit against the full prevailing wage for benefit payments. The statute requires maintenance of records demonstrating compliance, but that obligation falls on the employer, not the ERISA plan, and any effect on the plan is too tenuous, remote or peripheral to support preemption. Finally, the sole purpose and primary effect of the statute is to set a floor for total compensation and for cash wages, which is a traditional exercise of state authority.

The Ninth Circuit has recently restated the essence of its ERISA preemption analysis in a very simple test. In *Employee Staffing Services Inc. v. Aubry*, 20 F.3d 1038 (9th Cir. 1994), deciding that a workers compensation statute was not preempted by ERISA, the court posed the issue as follows:

> Is the state telling employers how to write their ERISA plans, or conditioning some requirement on how they write their ERISA plans? Or is it telling them that regardless of how they write their ERISA plans, they must do something else outside and independently of the ERISA plans? If the latter, as here, there is no preemption.

20 F.3d at 1041. In the instant prevailing wage laws, the state of California is telling employers that regardless of how they write their ERISA plans, or even whether they have ERISA plans, they must pay prevailing cash wages and prevailing total compensation. Accordingly, there is no preemption.

The Court notes that the system Plaintiffs concede would not be preempted, the "total package" system, when combined with minimum wage laws, which Plaintiffs do not and cannot argue are preempted by ERISA, is legally and logically no different from the "two tier" scheme challenged here. The minimum wage laws also set a floor for cash wages, and thus would discourage payment of benefits exceeding the difference between the total prevailing wage and the minimum wage. The challenged second tier of the instant statute merely raises that minimum wage higher than the cash wages Plaintiffs wish to pay.

In addition, Plaintiffs' argument for preemption is that their ERISA plans are affected in that the statute creates a disincentive for them to maintain the benefits at their current level. However, an ordinary prevailing wage statute which does not involve any credit for benefits paid, and which Plaintiffs concede would not be preempted, creates a greater disincentive than that of which

Plaintiffs complain. Thus, Plaintiffs' argument would sweep far too broadly if given its full effect.

The conflicting authority does not persuade this Court otherwise. The case of *General Electric v. Dept. of Labor,* 891 F.2d 25 (2nd Cir. 1989) involved a prevailing wage statute very similar to the "line by line" scheme that Judge Vukasin held preempted. The majority held the statute was preempted by ERISA under the teachings of *Alessi v. Raybestos-Manhattan Inc.,* 451 U.S. 504, 511 (1981) (state statute prohibiting ERISA pension plans from reducing pension benefits by amount of workers' compensation award preempted by ERISA; ERISA leaves to the private parties, not the Government, the determination of the level of benefits to be paid). A state law relates to a benefit plan if it prescribes either (1) the type and amount of an employer's contributions to a plan, (2) the rules and regulations under which a plan operates, or (3) the nature and amount of benefits provided under a plan. The majority held that this prevailing wage law intruded into all three of these preempted areas as follows: (1) employers must either bring their plans into conformity with the prevailing plans or make up the difference in cash payments; (2) employers must make records demonstrating compliance available to the state; and (3) the employee may be required to accept cash payments which may be of lesser value than the unpaid benefits would have been.

Circuit Judge George C. Pratt wrote a well-reasoned dissent, opining that ERISA preemption is not so broad as to invalidate a state law which neither purports to regulate employee benefits plans nor affects a plan's primary administrative functions. The types of statutes properly

held preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically and apply solely to ERISA plans, or interfere with the calculation of benefits owed to an employee. Laws of general application and traditional exercises of state power, whose economic and administrative effects on benefits plans are incidental to their primary objectives, are generally not preempted. The challenged prevailing wage law did not interfere with any of the primary administrative functions of ERISA plans, affect the structure or administration of benefit plans, determine an employee's eligibility for benefits, or control the type or level of benefits provided. Rather, it sought to equalize the minimum labor costs for employers bidding on public works contracts, a valid exercise of the state's traditional regulatory authority. Judge Pratt stated:

> [W]here a law claimed to be superseded by ERISA "is an exercise of a State's police powers," the law should not be held preempted "unless this conclusion is unavoidable." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2nd Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). While preemption may be an unavoidable conclusion where a state law explicitly singles out ERISA plans for different treatment, [citation omitted] or directly alters the calculation or payment of benefits under ERISA-covered pension plans, *see Alessi* . . . , or creates a cause of action to enforce a right granted by ERISA, [citation omitted], no such problem is presented by the statute before us. The fact that employers may choose to comply with the law by providing a different benefits plan or a combination of benefits and cash

> rather than simply paying the additional costs as wages, does not render the statute preempted. *See Shaw v. Delta Air Lines Inc*, 463 U.S. 85, 108 (1983) (while a state may not require employers to alter their ERISA plans, it is not preempted from giving them that option as a means of complying with state law).

891 F.2d at 30-31. While the prevailing wage law requires an employer to satisfy certain administrative responsibilities such as making its records available for inspection, and this may increase the cost of operating the benefit plan, this is "merely incidental" to the law's primary goal of equalizing labor costs. In short, "New York's prevailing wage statute is a law of general application whose tangential effects on employee benefit plans are negligible and wholly incidental to the law's primary purpose" and therefore is not preempted by ERISA. *Id.* at 31.

The Court finds the reasoning of the dissent in *General Electric* more persuasive than that of the majority. The majority fails to take into account the difference between regulating benefit plans and regulating wages in such a way that the employer has the choice of complying either through its ERISA benefit plan or in some other way. In *Shaw v. Delta AirLines*, the Supreme Court held that an employer's choice to provide a benefit plan cannot deprive the state of enforcement authority it would otherwise have. At issue there was a state disability law and an ERISA plan which contained disability benefits but did not comply with the state law. ERISA expressly exempts "any employee benefit plan . . . maintained solely for the

purpose of complying with applicable disability insurance laws." The employer argued, however, that by choosing to provide disability insurance benefits in its ERISA plan and not in a separate plan, it could deprive the state of its traditional authority. The Supreme Court disagreed, stating as follows:

> Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible. A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. . . . The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multi-benefit ERISA plan . . . does not make the state law wholly unenforceable as to employers who choose that option. In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan.

463 U.S. at 108. This analysis applies equally to state prevailing wage laws.

The Northern District of California has split on whether to follow the majority or the dissent in *General Electric*. Judge Charles A. Legge followed the majority in *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D.Cal. 1991), holding that a county ordinance which required in private contracts the payment of prevailing wages, as defined by Labor Code § 1773 . . . was preempted both by the NLRA, because it impermissibly

interfered in the collective bargaining process between private parties, and by ERISA. However, this case is distinguishable because there the ordinance applied to private rather than state-funded contracts, thus eliminating the important factor of the state's traditional exercise of the authority to set wages for state-funded projects.

The reasoning of the *General Electric* majority was expressly rejected by Judge Fern M. Smith in *Associated Builders and Contractors v. Curry*, 797 F.Supp. 1528 (N.D.Cal. 1992). In holding that California's prevailing wage law was not preempted by ERISA as applied to trainee employees employed by public works contractors, Judge Smith started with the presumption that in enacting ERISA, "Congress did not intend to preempt areas of traditional regulation." *Martori Bros. Distributors v. James-Massengale*, 791 F.2d 799 (9th Cir.), *cert. denied* 479 U.S. 949, 1018 (1986), quoting *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724 (1985). The statute at issue fell into such an area:

> The manifest purpose of § 1771 is to guarantee that public works contractors pay prevailing wages to their employees and do not compete in bidding on public works projects based on lower-than-prevailing wage rates. §§ 1773 and 1773.1 are designed to level the playing field among bidders on public works projects by counting payments for prevailing benefits toward the determination of prevailing wages. If only straight-time pay counted towards prevailing wages, bidders who paid prevailing benefits would be placed at a competitive disadvantage in bidding . . . vis-a-vis bidders who offered no benefits. On the other hand, by including the value of prevailing "employer payments" for

> benefits, the statutes do not mandate that bidders provide such benefits, only that they provide the value thereof.

797 F.Supp. at 1536-1537. Judge Smith rejected the reasoning that incorporation of prevailing benefits into determination of prevailing wages "relates to" employee benefit plans, finding the reasoning of the dissent in *General Electric* more persuasive.

As set forth in *ABC v. Curry*, the statute challenged here is clearly within the traditional exercise of the state's authority and should be held preempted only if that conclusion is inescapable. It is not. The fact that employers can comply fully with the statute without having an ERISA plan at all is enough to demonstrate that the statute does not relate to ERISA plans. The employer's choice to have such a plan and to take a credit based on the plan under the statute cannot deprive the state of its traditional authority. *Shaw*, 463 U.S. at 108.

The opposite result is not dictated by *District of Columbia v. Washington Board of Trade*, 113 S.Ct. 580 (1992), in which the Supreme Court ruled that ERISA preempted a District of Columbia mandate that employers which provide health coverage to employees extend equivalent coverage to employees receiving workers compensation. There an employer's obligation to provide workers compensation benefits was computed by reference to that employer's obligations under its own ERISA plan. The state was not telling the employer to provide workers compensation "outside and independently" of its ERISA plan, but by direct reference to its ERISA plan. The statute was not of general applicability to all employers, but only to those employers who had ERISA plans. Here, in

contrast, the law is of equal applicability to employers with and without ERISA plans. Further, the statutory reference is not to the employer's own ERISA plan, but to the prevailing level of benefits in the area. The Supreme Court has specified that the preemption language "related to any employee benefit plan" is intended to distinguish between relating to a benefit *plan* and otherwise relating to benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

The cases relied on by Plaintiffs to overcome the argument that prevailing wage laws are a traditional exercise of state power are inapposite since both involve attempts directly to regulate ERISA plans. *Local Union 598, Plumbers & Pipefitters Industry Journeymen and Apprentices Training Fund v. J.A.Jones Construction Company*, 846 F.2d 1213 (9th Cir. 1988), *aff'd summ.*, 488 U.S. 881 (1988) (statute requiring contributions to employee benefit plans at or above the prevailing level preempted by ERISA); *Hydrostorage Inc. v. Northern California Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied* 498 U.S. 822 (1990) (statute requiring contributions to apprenticeship program plans preempted by ERISA).

Plaintiffs mistakenly assert that this statute, as it is currently enforced, "restricts" the amount of benefits an employer may pay and requires employers to "vary the[ir] benefit plans to fit State-mandated criteria." If this were true, the statute might be preempted by ERISA. However, it is not. The statute compels only the payment of wages, not the restriction of benefits. Whether to offer any benefits, which benefits to offer, and at what level to fund the benefits remain fully private choices.

Plaintiffs also argue that the statute discriminates against ERISA plans which pay higher than prevailing benefit levels. They analogize to cases involving prevailing wage laws which mandate higher wages for apprentices enrolled in non-state approved ERISA apprenticeship programs than for apprentices enrolled in state-approved programs. The difference is apparent. A state may not treat employers differently based on their choice of ERISA apprenticeship plans, requiring them to pay *different* wages, in an attempt to regulate ERISA apprenticeship plans and coerce participation in those approved by the state. Here, however, the statute treats all employers the same, regardless of whether they have ERISA plans at all and regardless of the terms of such plans, by requiring all employers to pay the *same* wages (or more if they choose), at least the prevailing cash wage and at least the prevailing full compensation.

Therefore, this Court holds that the prevailing wage statute, as enforced by the "two tier scheme," is not preempted by ERISA. It is therefore unnecessary to address Defendants' argument that ERISA preemption should not apply to publics works at all, except to state that the argument lacks merit. *Building and Construction Trades Council v. Associated Builders and Contractors,* 113 S.Ct. 1190 (1993) is inapplicable to the instant case. There the Supreme Court held only that a bid specification is generally a proprietary, not a regulatory, action. However, statutes and implementing regulations clearly are regulatory. Defendants make much of the public policies effectuated by the prevailing wage statutes; their contradictory argument that the statutes constitute no more

than the acts of a party in the marketplace are wholly unpersuasive.

E. Attorneys' Fees

Plaintiffs move for interim attorneys' fees on the grounds that they were prevailing parties on appeal, arguing that this action was a "catalyst" for the state's change from the "line by line" to the "two tier" system. Defendants oppose the motion on the grounds, *inter alia*, that Judge Vukasin correctly held that, even as prevailing parties, Plaintiffs were not entitled to fees under ERISA § 1132(g) because they are not participants, beneficiaries nor fiduciaries of an ERISA plan.

Plaintiffs have attempted no showing here that they are participants, beneficiaries or fiduciaries of an ERISA plan, and under the statutory definitions of ERISA, they clearly are not. *See* 29 U.S.C. §§ 1002(a) (7), (8), (14), (16), (21). Plaintiffs argue that their action benefitted participants, but the statute limits its scope to actions brought *by* participants, beneficiaries or fiduciaries, and Plaintiffs cite no authority that an action brought by another party which may benefit a participant meets this statutory requirement.

Plaintiffs further seem to argue that they are entitled to attorneys' fees under 42 U.S.C. § 1988, despite the court's rejection of their § 1983 equal protection claim, because they prevailed on their ERISA claim. It is apparent that § 1988 was not intended to provide for attorneys' fees in all federal question litigation, and Plaintiffs have articulated no more limited theory supporting their

motion. Accordingly, Plaintiffs have not demonstrated entitlement to attorneys' fees.

F. Conclusion

Therefore, for the foregoing reasons, Plaintiffs, motion for summary judgment is DENIED in its entirety. However, since the Court finds that the challenged statutory scheme is not preempted by ERISA, Defendants' motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

Dated: Aug. 11, 1994

/s/ Claudia Wilken
CLAUDIA WILKEN
UNITED STATES
DISTRICT JUDGE

Copies mailed to counsel
as noted on the following page

APPENDIX D

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
Administration and Enforcement

29 USCS § 1144 (1996)

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United

States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b) [29 USCS §§ 1031, 1137(b)]) or any rule or regulation issued under any such law.

LABOR CODE
DIVISION 2. Employment Regulation and Supervision
PART 7. PUBLIC WORKS AND PUBLIC AGENCIES
CHAPTER 1. Public Works
ARTICLE 2. Wages

California Labor Code § 1771 (1996)

§ 1771. Requirement of prevailing local rate for work under contract

Except for public works projects of one thousand dollars ($ 1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

California Labor Code § 1773 (1996)

§ 1773. Ascertainment of prevailing rate; Data considered

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

California Labor Code § 1773.1 (1996)

§ 1773.1. Payments included in "per diem wages"; Requirement that copies of collective bargaining agreements be filed

Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

California Labor Code § 1775 (1996)

§ 1775. Forfeiture for paying less than prevailing rate; Rights of workers; Stipulation in contract; Action for recovery by Division of Labor Standards Enforcement

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($ 50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in

accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due. Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

California Labor Code § 1777.1 (1996)

§ 1777.1. Penalties for willful violations of chapter; Notice; Hearing

(a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is

found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

California Labor Code § 1777.5 (1996)

§ 1777.5. Employment of apprentices on public works

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and

subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the

apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on

an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($ 30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust

fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 2. CALIFORNIA APPRENTICESHIP COUNCIL
SUBCHAPTER 1. APPRENTICESHIP
ARTICLE 10. REQUIRED APPRENTICES ON PUBLIC WORKS CONTRACTS

8 California Code of Regulations § 230.1 (1996)

§ 230.1. Employment of Apprentices on Public Works

(a) Contractors shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with

the required 1:5 ratio of apprentice to journeymen hours, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5. Registered apprentices can only be obtained from the Apprenticeship Committee of the craft or trade in the area of the site of the public work. A contractor must request the dispatch of required apprentices from one of the applicable Apprenticeship Committees by giving the committee actual notice of at least 48 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. However, if a non-signatory contractor declines to abide by and comply with the terms of a local committee's standards, the Apprenticeship Committee shall not be required to dispatch apprentices to such contractor. Conversely, if an Apprenticeship Committee does not dispatch an apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the Apprenticeship Committee's Standards or these regulations within 48 hours of such notice (excluding Saturdays, Sundays and holidays) the contractor shall be excused from the obligation to employ apprentices for the remainder of the project.

(b) Apprentices employed on public works shall be paid the applicable apprentice prevailing per diem wage rate, available from DAS, and derived from the Director's survey of wages paid on public works in the geographic area of the craft or trade. DAS shall refer all complaints alleging a contractor's failure to pay proper apprentice wages to the Division of Labor Standards Enforcement for investigation and appropriate action.

(c) Apprentices employed on public works can only be assigned to perform work of the craft or trade to

which the apprentice is registered. Work of the craft or trade consists of job duties normally assigned to journeymen in the apprenticeable occupation.

(d) Contractors who have bid or have been awarded public works projects prior to December 31, 1989 and contractors who have bid prior to December 31, 1989 and have been awarded public works projects after January 1, 1990 shall comply with the provisions of Labor Code Section 1777.5 in effect prior to January 1, 1990.

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8 California Code of Regulations § 230.2 (1996)

§ 230.2. Payment of Apprenticeship Training Contributions to the Council

(a) Contractors who are neither required nor wish to make apprenticeship training contributions to the applicable local training trust fund shall make their training contributions to the Council. Contractors may refer to the Director of the Department of Industrial Relations applicable prevailing wage determination for the amount owed for each hour of work performed by journeymen and apprentices in each apprenticeable occupation.

(b) Training contributions to the Council are due and payable on the 15th day of each month for work performed during the preceding month.

(c) Training contributions to the Council shall be paid by check and shall be accompanied by a completed CAC-2 Form, Training Fund Contributions, (Rev. 10/91), or the following information:

(1) The name, address, and telephone number of the contractor making the contribution.

(2) The contractor's license number.

(3) The name and address of the public agency that awarded the contract.

(4) The jobsite location, including the county where the work was performed.

(5) The contract or project number.

(6) The time period covered by the enclosed contributions.

(7) The contribution rate and total hours worked by apprenticeable occupation.

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 8. OFFICE OF THE DIRECTOR
SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS
ARTICLE 1. DEFINITIONS

8 California Code of Regulations § 16000 (1996)

§ 16000. Definitions

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third

person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except

for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date-Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touch-up painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in

whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement at the time of the bid advertisement date and which are referenced in the general prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by

considering the appropriate collective bargaining agreements, Federal rates, or other data such as wage survey data, including the nearest labor market area or expanded survey as provided in Article 4 of these regulations.

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies. Note: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 8. OFFICE OF THE DIRECTOR
SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS
ARTICLE 4. WAGE DETERMINATIONS

8 California Code of Regulations § 16200 (1996)

§ 16200. General; Basis for Determining Prevailing Wage Rate

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to

Sections 1773.1 and 1773 8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper

consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements or Wage Surveys.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or

type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

Note: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as

true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION: 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION: 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION: 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION: 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified

in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor

from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis-Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

Note: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's

consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for

all projects recently completed or in progress in the locality or in the nearest labor market area.

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8 California Code of Regulations § 16203 (1996)

§ 16203. Format

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director

of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

GENERAL PREVAILING WAGE DETERMINATION MADE BY THE DIRECTOR OF INDUSTRIAL RELATIONS PURSUANT TO CALIFORNIA LABOR CODE PART 7, CHAPTER 1, ARTICLE 2, SECTIONS 1770, 1773 AND 1773.1

FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY CONSTRUCTION AND DREDGING PROJECTS

Craft: #Drywall Installer/Lather (Carpenter)

Determination: SC-31-X-41-96-1

Issue date: August 22, 1996

Expiration date of determination: June 30, 1997** The rate to be paid for work performed after this date has been determined. If work will extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. Contact the Division of Labor Statistics and Research for specific rates (415) 972-8628.

All localities within: Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara and Ventura counties.

		Employer payments			
Classification (Journeyperson)	Basic hourly rate	Health and welfare	Pension	Vacation and Holiday	Training
Drywall Installer	$23.80	$3.29	$1.01	$0.51[a]	$0.29

Straight-time		Overtime hourly rate			
Hours	Total hourly rate	Daily 1 ½X	Saturday 1 ½X	2X	Sunday and Holiday
8	$28.90	$40.80	$40.80[b]	$52.70	$52.70

Determination: SC-31-X-41-94-1A

Issue date: August 22, 1994

Expiration date of determination: June 30, 1995,* Effective until superseded by a new determination issued by the Director of Industrial Relations. Contact the Division of Labor Statistics and Research (415) 972-8628 for the new rates after 10 days from the expiration date, if no subsequent determination is issued.

Employer payments

Classification (Journeyperson)	Basic hourly rate	Health and welfare	Pension	Vacation and Holiday	Training
Stocker, Scrapper	$10.00	$3.29	–	$0.51[a]	$0.29

Straight-time		Overtime hourly rate			
Hours	Total hourly rate	Daily 1 ½X	Saturday 1 ½X	2X	Sunday and Holiday
8	$14.09	$19.09	$19.09[b]	$24.09	$24.09

# Indicates an apprenticeable craft. Rates for apprentices are available in the addendum.

[a] Includes an amount per hour worked for supplemental dues.

[b] Rate applies to first 8 hours only. Double time thereafter. Saturdays in the same work week may be worked at straight-time if job is shut down during the normal work week due to inclement weather.

Note: Training fund contributions for crafts and classifications in apprenticeable occupations are required to be made in accordance with the provisions of Labor Code Section 1777.5 and the California Code of Regulations Title 8, Chapter 2, Part I, Article 10. If appropriate rates are not specified by a determination, they may be ascertained by contacting a local office of the Division of Apprenticeship Standards.

Recognized Holidays: Holidays upon which the general prevailing hourly wage rate for holiday work shall be paid shall be all holidays determined by wage surveys or recognized in the collective bargaining agreement, applicable to the particular craft, classification, or type of worker employed on the project, which is on file with the Director of Industrial Relations.

Travel and subsistence payments: The contractor shall make all travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreement filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8.